

JUN 29 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1881

In The
Supreme Court of the United States
October Term, 1989

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

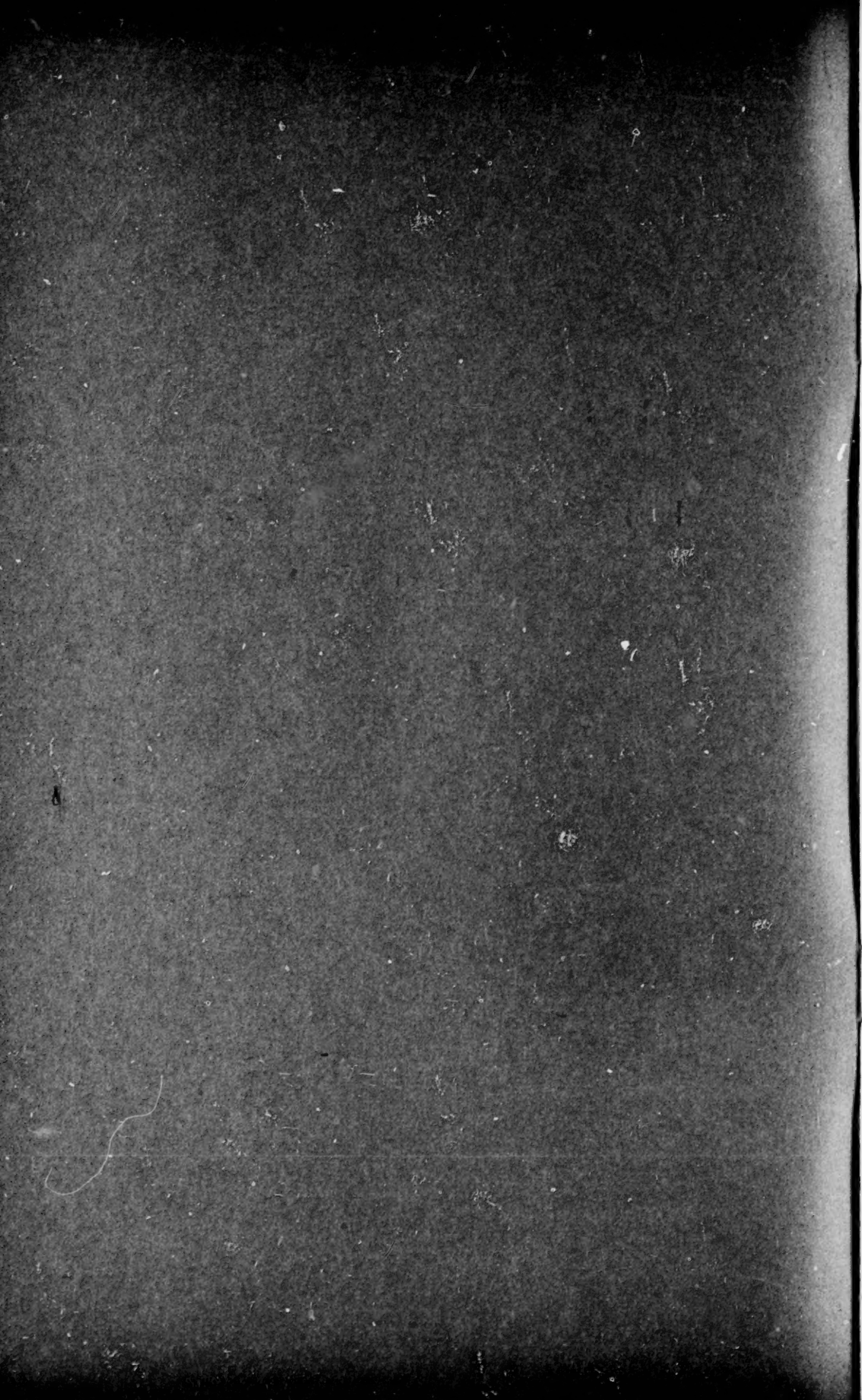
STATE OF OKLAHOMA, ex rel.
DON ROBERTS, DISTRICT ATTORNEY
PITTSBURG COUNTY,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA

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QUESTIONS PRESENTED

Respondent rejects the Petitioners' characterization of questions presented. They should be stated as follows:

1. Whether Petitioners' failure to timely appeal to the state court of last resort, the Oklahoma Supreme Court, renders this Petition jurisdictionally defective under Rule 10.1, Supreme Court Rules, and 12 U.S.C. § 1257 for lack of a final decision?

2. Whether the Dismissal for untimely filing issued by the Oklahoma Supreme Court was an adequate state ground obviating any necessity to review alleged federal claims?

3. Whether Petitioner has insufficient standing to assert a "parental right" claim under the Ninth Amendment previously argued in trial court by Intervenor parent, and, further, while trial Court Intervenor's appeal of such claim remains unresolved in Oklahoma Court of Appeals?

4. Whether an alleged federal "parental right" claim is ripe for discretionary review since at least two Oklahoma appellate courts may still resolve claim through pending appeal by state court intervenor parent?

5. Whether the state statute, 10 O.S. § 401, et seq., which requires licensure of, and is generally applicable to, all Oklahoma child care facilities is valid if such law incidentally requires an act (i.e., application for a license) forbidden by Petitioners' personal religious beliefs?

PARTIES TO THE PROCEEDINGS

The Respondent is correctly named and described in the Petition for Writ of Certiorari.

The Court's attention, however, is respectfully directed to a separate pending appeal pursued by one of the parties in the trial court, Defendant-Intervenor, E.C. Phillips, individually and next friend of Jimmy Phillips, a minor. Mr. Phillips is the parent of the minor. (See, Petition for Writ of Certiorari, App. at 31)

The Trial Court Defendant-Intervenor is not a party to this Petition, but is pursuing a separate appeal still pending in the Oklahoma Court of Appeals (No. 71.501). He is, however, represented in the state appellate court by counsel for these Petitioners. (See Resp. App., at 1)

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No. 89-1881

In The
Supreme Court of the United States
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REV. JERRY McDONALD and
CALVARY BOYS RANCH,
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v.

STATE OF OKLAHOMA, ex rel.
DON ROBERTS, DISTRICT ATTORNEY
PITTSBURG COUNTY,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA**

Respondent respectfully requests that the Petition for Writ of Certiorari to review either the Order of the Oklahoma Supreme Court or Oklahoma Court of appeals be denied.

OPINIONS BELOW

Opinions and Orders of various Oklahoma courts are accurately cited by Petitioners, and are included in

Petitioners' Appendix (hereinafter, Pet. App.). There are, however, two additional orders that will be discussed in the following text. First, Petitioners should have included an Order dated August 18, 1988, by Chief Justice Doolin of the Oklahoma Supreme Court denying consolidation of Defendant Intervenor Phillips' appeal (#71,501) with the separate appeal of Petitioners (#69,319). This Order is reprinted in Respondent's Appendix (hereinafter, Resp. App.) at p. 1. Second, the Court's attention is directed to an Order dated May 15, 1990, by current Chief Justice Hargrave transferring trial court Intervenor's pending appeal to the Oklahoma Court of Appeals. (Resp. App., at 2).

JURISDICTION

Respondent unequivocally asserts that Petitioners failed to properly invoke this Court's jurisdiction for discretionary review under 28 U.S.C. §1257(a) or Rule 10.1. Supreme Court Rules. The Oklahoma Supreme Court dismissed Petitioner's State court appeal as untimely. (Pet. App., at 9) Consequently, there is no *final* decision as to any federal questions by the state court of last resort.

Petitioners' attempt to argue a Ninth Amendment "parental right" claim is also jurisdictionally deficient. That issue is currently before the Oklahoma Court of appeals by virtue of the trial court Intervenor's separate appeal. Notwithstanding a lack of standing by Petitioners, that federal issue is not "ripe" for review until a

final decision is rendered by the Oklahoma Supreme Court.

STATEMENT OF CASE

The Petitioners' Statement, as contained in the petition, does not sufficiently elaborate on all relevant orders and events. Respondent submits the following additional Statement relevant to this Court's inquiry into the instant petition.

1. The Oklahoma Supreme Court by Order dated February 21, 1990, denied Petitioners' state Petition for Writ of Certiorari as untimely. Under Rule 3.14(G), Rules of the Oklahoma Court of Appeals, the Petitioners had twenty (20) days from July 18, 1988, the date rehearing was denied by the Court of Appeals (See Resp. App., at 8), in which to file a petition for Writ of Certiorari with the Oklahoma Supreme Court.

2. Petitioner failed to file its petition until two (2) days after the deadline. The rule explicitly states that the "time for such application shall not be extended." Therefore the Oklahoma Supreme Court dismissed due to a jurisdictional time bar. This was an "independent and adequate" state ground. The Oklahoma Supreme Court was the state court of last resort under Oklahoma law. 20 O.S. §30.1, *et seq.*

Because of the jurisdictional defect, the Oklahoma Supreme Court neither considered, nor ruled upon, Petitioners' alleged federal questions. There is no final

decision of federal issues by the court of last resort. Petitioners did not address these factors.

3. Of equal importance to the consideration of the Petition herein, is the effect of a separate and prior order by the Oklahoma Supreme Court. By Order dated August 18, 1988, consolidation of an appeal by the trial court intervenor with that of Petitioners was denied (Resp. App., at 1). Contrary to the Petitioners' view (See Petition, at 9), the alleged "parental right" claim under the Ninth Amendment to the U.S. Constitution remains unresolved by the Oklahoma Supreme Court. The trial court Intervenor, the parent of a minor residing at Calvary Boys Ranch, continues to assert in the unresolved State appeal (#71,501) the identical Ninth Amendment issue of parental authority which Petitioners curiously attempt to argue before this Court. (Resp. App., at 4).

Notwithstanding Petitioners' highly questionable standing to assert a federal "parental right" claim without guardianship or court ordered custody of the children residing at Calvary Boys Ranch, neither the Oklahoma Court of Appeals nor the Oklahoma Supreme Court have had an opportunity to rule on that and other federal issues (Resp. App., at 4-7). Moreover, this Respondent remains a party in that appeal.

4. Petitioner at no time objected to or argued against, intervention in the trial court by Intervenor Phillips. Furthermore, counsel of record for Petitioners has omitted any reference to, or explanation of, their legal representation of Intervenor, and, equally critical, counsels' presentation of Intervenor's Ninth Amendment "parental right" claim in the unresolved State appeal.

Consequently, the Petitioners' attempt to combine a federal Ninth Amendment claim with an alleged First Amendment "Free Exercise Clause" claim is defective. Only the parents or guardians of the minors may pursue such a claim.

Even if one were to presume that Petitioners possessed requisite standing, the Ninth Amendment claim is not "ripe" for review absent a final decision by the Oklahoma court of last resort. Jurisdiction is lacking not only under 28 U.S.C. §1257(a), but also Rule 10.1. Supreme Court Rules.

5. As the Petitioners essentially conclude under these circumstances (Pet., at 10), a First Amendment, "Free Exercise" claim cannot survive absent a "hybrid" situation as required under this Court's recent decision in *Employment Division Department of Human Resources of Oregon, et al., Petitioners v. Alfred L. Smith, et al.*, 58 L.W. 4433. Petitioners also concede that the Oklahoma Child Care Facilities Licensing Act, 10 O.S. §401 *et seq.*, is a "neutral, generally applicable law" requiring an act (licensure) which only incidentally affects Petitioners' religious beliefs. (Pet., at 10)

The Statute in no manner inquires into religious beliefs. Petitioner fails to discuss, or even observe that the legislation applies to private and non-profit entities alike whether owned by secular or religious organizations. The statute's plain language simply addresses the health, safety, and general welfare concerns normally associated with protection of minor children residing in facilities away from their parents.

Without question, the State is free to regulate and protect minor children who are vulnerable to, and totally

dependent upon, residential facility employees. Petitioners omitted any reference to Chief Justice Scalia's statement that the Court has never held that personal religious views excuse conformance with an otherwise valid law concerning conduct that the State is free to regulate. *Id.* at 4435.

In the instant appeal, Petitioners did not assail the statute's provisions as being directed specifically at religion or religious views. Rather, they assert that the mere act of "applying" for a license subverts their beliefs. Such pale assertions do not rise to the level of a claim under the Free Exercise Clause. Petitioners have additionally failed to offer or discuss any relevant decisions of this Court which remotely suggest that the acts of applying for, or maintaining, a license for child care facilities under these facts is violative of First Amendment rights.

THE COURT SHOULD DENY THE PETITION FOR CERTIORARI

The Petitioners' State Court appeal was appropriately dismissed as untimely by the Oklahoma Supreme Court. (Pet. App., at 9). The instant petition should be denied due to lack of a final decision by the State court of last resort.

The State order of dismissal resulted in there being no reviewable final decision as to federal issues. Such ruling, however, was also an independent and adequate state ground. (See Section A, *infra*.) As the following discussion succinctly illustrates, there is also a total failure by Petitioners to present a ripe Ninth Amendment

"parental right" claim. That federal question remains unresolved in the Intervenor's pending state appeal involving this Respondent.

Finally, the alleged First Amendment Free Exercise Claim does not involve a "hybrid" situation as discussed in the *Oregon* opinion, *Id.*, at 4436. Thus, the "neutral, generally applicable" Oklahoma child care licensing statute is valid since it only incidentally requires an action, obtaining a license, which is at odds with Petitioners' religious views.

A. THERE IS NO FINAL DECISION BY THE STATE COURT OF LAST RESORT

In delineating this Court's discretionary authority to entertain a petition for writ of certiorari, 28 U.S.C. § 1257(a), requires that there be a final decision by the State court of last resort. Numerous decisions of this Court have further defined this finality requirement, and they are pertinent here.

In *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, this Court noted that the Supreme Court should only intervene in State Court proceedings after the "highest state court in which a decision could be had" has ruled on the federal question. The Petition in this instance, however, is jurisdictionally deficient. Petitioners failed to timely appeal an adverse decision by the Oklahoma Court of Appeals as required by Rule 3.14(G). That rule clearly stated that no extensions would be allowed. As a direct consequence, there is no final decision by the State Court of last resort, the Oklahoma Supreme Court, and jurisdiction is defective.

In dismissing a petition under Section 1257, this Court has held that "no jurisdiction exists unless a federal question has been both raised and decided in the state court below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Without question, no federal issues were raised or decided under the Order of dismissal. Absent the arguments and rulings appearing on the record, jurisdiction fails. *Id.*, at 2321.

A lack of certiorari jurisdiction under Section 1257 was similarly the basis for dismissing a petition improvidently granted in *Hamerstein v. Superior Court of California*, 341 U.S. 491 (1951). In that case, this Court held that failure to utilize proper state review procedures was fatal. *Id.*, at 492. More directly on point, the longstanding position of this Court has been that failure to timely appeal within the State appeals process results in deficient jurisdiction. *Chesapeake & Ohio Railway Co. v. McDonald*, 53 L.ed 963, at 965 (1909); *See also, Newman v. Gates*, 204 U.S. 385, 390 (1907). There has been no qualification of this position on state procedural holdings with the very limited exception of federal habeas corpus. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Otherwise, a State rule requiring timely actions has been held sufficient and also an "adequate and independent state law ground." *Id.*, at 81-82.

The purpose of Rule 3.14(G) is clearly designed to encourage timely pursuit of significant cases or risk a loss of further review. Petitioners were aware that no extensions were authorized. The State's policy of limiting crowded dockets to issues of great importance is obvious. Petitioners failure to comply cannot be ignored, and finality is wholly lacking under Section 1257. Petitioners'

avoidance of this question in the Petition further illustrates their lack of concern, or disdain for, the importance of finality.

B. THE OKLAHOMA SUPREME COURT HAS NOT RESOLVED AN ALLEGED NINTH AMENDMENT "PARENTAL RIGHT" CLAIM.

Petitioners failed to inform the Court that the trial court Intervenor is currently pursuing the same Ninth Amendment claim in a pending State appeal (Resp. App., at 5). Moreover, this Respondent remains a party to that appeal. As this Court is aware, Intervenor Phillips is a parent of a minor residing at Calvary Boys Ranch. Both Intervenor Phillips' appeal and this Petition arose from the same trial court action involving this Respondent. (Pet. App., at 25) The Oklahoma Supreme Court, however, has not resolved that claim since the state court refused to consolidate the appeals. Consequently, there is no final decision on the Ninth Amendment "parental right" claim.

Although neither the Reverend McDonald or Calvary Boys Ranch have standing to assert a "parental right" claim, that federal question is not ripe for review until the Oklahoma Supreme Court addresses and resolves the claim in the pending appeal of Intervenor Phillips.

This Court has often noted the need to avoid entertaining federal questions when remaining litigation may resolve the issue in state appellate courts. *Radio Station WOW, Id.*, at 127. In *Costareli v. Massachusetts*, 421 U.S. 193 (1975), moreover, this Court explicitly stated that only final decisions of the state court of last resort should be

reviewed. Additionally, that policy is specifically designed to preclude review of issues, as in the instant Petition, that "may be unresolved" in the state courts. *Id.*, at 196. Absent, final resolution in the state court, the court lacks jurisdiction. *Id.*, at 197.

The pending appeal was recently assigned to the Oklahoma Court of Appeals. (Resp. App., at 2) Therefore, the State could review the Ninth Amendment question first in the intermediate appellate court, and then again on certiorari to the Oklahoma Supreme Court. Finally, counsel for Petitioners were aware of this situation since they represent Intervenor in the pending state appeal. (Resp. App., at 4).

One of the primary purposes of finality under section 1257 is to avoid piecemeal litigation. *North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). One cannot envision a more appropriate case where avoiding "fragmentary review" is required. *Radio Station WOW*, *Id.* at 127. The decision in the Intervenor's State appeal will directly affect this Respondent and the state statute, 10 O.S. § 401, *et seq.*, as written and enforced. No scenario or reason exists in support of hearing Petitioners' alleged Ninth Amendment "parental right" claim.

C. THERE IS NO HYBRID COMBINATION OF FIRST AND NINTH AMENDMENT CLAIMS

The Petitioners' attempt to describe a "hybrid" set of federal claims to invoke the recent *Oregon* decision is without merit. Respondents have no reviewable Ninth Amendment "parental right" claim to join with an alleged

Free Exercise Clause violation. Given the Petitioners' concession that the State Statute is a "neutral, generally applicable" licensure law (Pet., at 10) which only incidentally affects their religious views, there is no basis for asserting a violation of the Free Exercise Clause, *Department of Human Resources of Oregon*, Id. at 4435.

Citing *United States v. Lee*, 455 U.S. 252 (1983), the Court in the *Oregon* case held that personal religious beliefs do not exempt an individual from complying with, for example, a neutral law such as the Oklahoma statute which is applied generally to all child care facilities regardless of secular or religious ownership. The State licensure Statute neither inquires into religious beliefs, nor is directed at religion. It protects all minor children in terms of health, safety, and general welfare. Minors are extremely vulnerable when solely dependent for care on persons other than parents. This is a valid, longstanding area of state regulation. The incidental requirement that Petitioners apply for, and maintain, a license does not offend the First Amendment.

CONCLUSION

As the preceding discussion demonstrates, there are no federal issues of constitutional dimension that are before this Court. This Court should deny the Petition for Writ of Certiorari for the reasons stated.

Respectfully submitted,

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Attorney for Respondent

June 29, 1990

App. 1

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

Thursday, August 18, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING
ORDER:

71,496 – STATE OF OKLAHOMA ex rel. COMMISSION-
ERS OF THE LAND OFFICE V. THE CITY OF
STILLWATER, a municipality, et al.

Dismissal motion contained in August 12, 1988
response to petition in error is deferred pend-
ing merits adjudication.

(71,501 – STATE OF OKLAHOMA, ex rel. DON
ROBERTS, DISTRICT ATTORNEY PITTSBURG
COUNTY V. REV. JERRY McDONALD et al.

(69,319 – STATE OF OKLAHOMA, ex rel. DON
ROBERTS, DISTRICT ATTORNEY PITTSBURG
COUNTY V. REV. JERRY McDONALD et al.

Court notes motion for consolidation of these
two appeals. However, consolidation does not
appear appropriate at this time since case No.
69,319 is fully at issue and was assigned to the
Court of Appeals June 21, 1988, whereas the
instant appeal was filed August 9, 1988, with
notice of completion of record not due until
January 19, 1989, followed thereafter by brief-
ing.

71,416 – STANLEY D. REISS V. ELSIE M. REISS, NOW
ELSIE M. SCOTT

Court notes counter-petition in error filed
August 9, 1988, does not reflect on its face that
it is timely under Rules of Appellate Procedure
in Civil Cases, 12 O.S., Ch. 15, App. 2, Rule
1.18. Appellee/counter-petition in error should
not be dismissed. Attached to the response

App. 2

should a certified copy of the order of the trial court being challenged in the counter-appeal. Response due not later than September 7, 1988.

- 70,019 - SALES MATES, INC., an Oklahoma corporation, et al. v. THE ESTATE OF CHARLES ARTHUR ELDER, P-85-182, BEVERLY ELDER, Personal Representative

Motion to stay appellate proceedings, filed August 10, 1988, essentially calls for an indefinite extension of briefing time. Appellant is granted until September 12, 1988, in which to file the brief in chief, and no further extensions are contemplated. In the event of a resolution below of the issues currently on appeal, as mentioned as a possibility in the motion, appellant may file a dismissal of this appeal.

/s/ Bill B. Doolin

CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

IT IS HEREBY ORDERED that the following case(s) be and hereby is(are) assigned to the Court of Appeals, Tulsa Divisions:

- 71,365 (Cons. w/71,737, 71,738 & 72,504) Western Petroleum, Inc. v. Petron Energy, Inc. et al.
- 71,501 State of Oklahoma ex rel., Don Roberts etc. v. E. C. Phillips etc.
- 72,136 James W. Rosencutter and Taresa Lea Rosencutter v. Briercroft Service Corp.
- 71,398 (Cons. w/72,781) Cal Acree et c. v. Mohammed Hadi etc.
- 71,963 George Miskovsky, Sr. v. Carroll E. Gregg.

App. 3

- 72,056 Susan Davis v. Luke D. Davis.
- 73,966 David Lee Pearce v. Special Indemnity Fund et al.
- 74,071 Walter Matlock v. George E. Failing Co. et al.
- 74,107 Sport O'Kings Farms v. Randy Thomas et al.
- 73,976 Edmond Tire & Auto v. Larry Bohot et al.
- 73,907 Chester Prophet v. Vickers et al.
- 73,664 James Gregory v. Special Indemnity Fund et al.
- 73,458 John Z. Walmer v. Rockwell International et al.
- 73,383 L. D. Ford v. Rockwell International et al.
- 73,330 Patricia Mae Wolfenbarger v. Safeway Stores, Inc.

IT IS ORDERED that the Rules of Practice and Procedure in the court of Appeals and on Certiorari to the Court, 12 O.S.1981, Ch. 15, App.3, are to be followed until further order of this Court.

IT IS FURTHER ORDERED that until the Court of Appeals has made final disposition of any assigned case, any and all Motions, Petitioners for Rehearing, etc., must be filed with the Clerk of the Appellate Courts, Room 1, State Capitol Building, Oklahoma City, Oklahoma.

DONE BY ORDER OF THE SUPREME COURT this
15th day of May, 1990.

/s/ Ralph Hargrave
CHIEF JUSTICE

No. 71501
IN THE
SUPREME COURT FOR THE
STATE OF OKLAHOMA
STATE OF OKLAHOMA, *ex rel.* DON ROBERTS,
DISTRICT ATTORNEY
PITTSBURG COUNTY,

Appellee,

vs.

REV. JERRY McDONALD and CALVARY BOYS RANCH,
and

E.C. PHILLIPS, Individually
and Next-Friend of JIMMY PHILLIPS, a minor,

Appellant/
Intervenor.

On Appeal from the District Court
Pittsburg County
The Honorable Judge Robert A. Layden Presiding
Injunction and Constitutional

BRIEF OF APPELLANT/INTERVENOR

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**RULE 3.14 THE PETITION
FOR CERTIORARI - CONTENTS**

G. The petition for certiorari shall be filed with the clerk of the Supreme Court within twenty (20) days from the date the order either denying or dismissing a petition for rehearing was filed by the Court of Appeals. The time for such application shall not be extended. Petition, answer and reply shall be accompanied by ten (10) legible copies.

